In the Supreme Court of Ohio

League of Women Voters of Ohio, et al.,	:	
	:	
Relators,	:	Case No. 2021-1193
	:	
v.	:	Original Action Pursuant to Ohio Const., Art. XI
	:	
Ohio Redistricting Commission, et al.,	:	
	:	Apportionment Case
Respondents.	:	
	:	

OHIO SECRETARY OF STATE FRANK LAROSE'S RESPONSE TO PETITIONERS' MOTION FOR AN ORDER DIRECTING RESPONDENTS TO SHOW CAUSE FOR WHY THEY SHOULD NOT BE HELD IN CONTEMPT OF THE COURT'S APRIL 14, 2022 ORDER

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I. INTRODUCTION

This Court ordered the Commission to convene, to adopt a new General Assembly district map, and to file that map no later than May 6, 2022. Nearly two weeks before that deadline, on April 25, 2022, Petitioners preemptively filed a motion to show cause ("Motion"). Petitioners' Motion was (and still is) premature and fails to allege any contemptuous conduct by Secretary of State Frank LaRose ("Secretary LaRose"). Significantly, the Commission met on May 4, 2022, the day after the May 3 primary election (which Secretary LaRose is duty bound to administer) and two days before this Court's deadline. Additionally, the Commission is scheduled to meet again on May 5, 2022. There has been no violation of this Court's April 14 orders; thus, Petitioners' Motion should be summarily denied.

Petitioners knew this when they filed the frivolous Motion ten days ago. Their real objective is to provoke this Court into asserting control over the Commission and the manner in which it adopts a district plan. That extraordinary request for relief lacks a basis in law. Notably, this Court has already recognized that such an overreach is unconstitutional, and that this Court's function is to review the Commission's district plan for constitutional compliance *after* it is adopted and presented to this Court. A new district plan has not yet been adopted or presented to this Court. Therefore, and based upon the additional reasons stated herein, Petitioners' untimely and unwarranted Motion should be denied.

II. BACKGROUND

This is not the first unfounded motion to show cause filed by Petitioners. On March 29, 2022, Petitioners filed a motion against the Commission for adopting the third revised plan instead of an incomplete plan that was being worked on by third-party mapmakers, Dr. Douglas Johnson and Dr. Michael McDonald ("Mapmakers"). *See Petitioners' Motion to Show Cause filed 3/29/22*.

Petitioners sought to hold the majority members of the Commission in contempt for voting in favor of the only plan that was complete by the pertinent deadline, and before that plan was reviewed by this Court for constitutionality. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-1235, ¶ 73 ("We also note that by the admission of one of the plan's primary drafters, Dr. Johnson, that plan is not yet fully completed."). Petitioners' motion was meritless and denied by the Court on April 14, 2022.

Although the Court did not articulate the basis for denying Petitioners' motion, its opinion invalidating the third revised plan acknowledged limitations on its authority to (a) issue orders dictating the Commission's conduct, and (b) take action in response to the federal court's potential adoption of the second revised plan in *Gonidakis v. Ohio Redistricting Comm*, S.D.Ohio Case No. 2:22-cv-0773 ("Gonidakis Case"). Specifically, this Court stated:

> The petitioners in *Bennett v. Ohio Redistricting Comm.* (Supreme Court case No. 2021-1198) and the petitioners in Ohio *Organizing Collaborative v. Ohio Redistricting Comm.* (Supreme Court case No. 2021-1210) ("*OOC* petitioners") ask this court to itself adopt a plan—either the independent map drawers' plan or Dr. Rodden's latest plan (referred to previously as "the Rodden III plan"). We decline to do so because we lack the constitutional authority to grant that relief. The Ohio Constitution expressly forbids this court from "order[ing], in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed by this article." Article XI, Section 9(D)(1); *see also* Article XI, Section 9(D)(2) ("No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district").
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> The *Bennett* petitioners acknowledge that Article XI, Section 9(D) prohibits the relief they are seeking, but they argue that "the facts have changed and now stand far beyond what Article XI contemplates." They argue that Section 9(D) "must bend in this moment." Yet they offer weak legal support for this assertion. Instead, they assert that it would be better for an Ohio court—as opposed to a federal court—to implement a plan and that doing so "will do the least violence to Ohio's constitutional structure." But we cannot disregard Section 9(D) simply to avoid the possibility that a federal court may take action under federal law. And as a matter of comity, a federal court imposing a remedy under federal law would be mindful of the reality that we have declared that all four maps adopted by the commission violate the Ohio Constitution.

> …
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> E. Possible approach for the commission
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> … Regardless of the availability of Dr. McDonald and Dr. Johnson to complete their work on the plan they were preparing, the commission should continue the course it began when it followed our and the attorney general's recommendations to engage independent map drawers. Even if the commission is unable to engage Dr. McDonald and Dr. Johnson, the commission has a head start toward a complete and possibly constitutionally compliant plan. Dr. McDonald and Dr. Johnson produced an almost completed set of General Assembly–district maps for which the commission agreed to pay them nearly $100,000. To completely abandon that work seems like a waste of resources and taxpayer dollars and could take us further away from the constitutionally required goal of a fair district plan. Just as in *League III*, when we recommended that the commission take certain steps to ensure a constitutional process, we now likewise express the view that the commission should use the independent map drawers' work thus far as a starting point for the next plan.

League of Women Voters, Slip Opinion No. 2022-Ohio-1235 at ¶¶ 64-65, 77 (emphasis added).

This Court gave no directive regarding the date or time for the Commission to convene; instead, the Court provided a May 6 deadline to file a new plan. *Id*. at ¶¶ 78-81 ("We further order the commission to file the district plan with the secretary of state by 9:00 a.m. on May 6, 2022, and to file it with this court by noon on the same date… For good cause shown, the commission may file a motion for extension of time to file the district plan with the secretary of state."). That date has not come and gone.

On April 25, 2022, eleven days before the Court's deadline to pass a fourth revised plan, Petitioners filed the instant Motion against Secretary LaRose and the other majority members of the Commission claiming they are violating this Court's orders when they plainly are not. Petitioners complain that the Commission has not convened a meeting yet, but the Commission is not under a Court order to do so by any particular date. *Motion*, pp. 1-5. Petitioners also improperly ask this Court to insert itself into the map-making process by ordering the Commission to reengage the Mapmakers and draft the fourth revised plan in a manner prescribed by the Court. *Id*. at p. 10.

However, as previously established in these proceedings and further discussed herein, Petitioners' Motion requests relief that is not available or appropriate. And Petitioners' Motion, which was premature when filed, is now moot because the Commission convened on May 4, 2022.

III. LAW & ARGUMENT

A. THERE ARE NO GROUNDS TO HOLD SECRETARY LAROSE IN CONTEMPT

Petitioners' Motion should be denied and there is no basis to find Secretary LaRose in contempt for several reasons. First, Secretary LaRose has not engaged in any contemptuous conduct and any allegations that the Commission failed to convene are moot. Second, Petitioners' Motion is not ripe for adjudication because it is based upon speculation and events that have not yet occurred. Third, the Separation of Powers Doctrine prohibits this Court from controlling the manner in which the Commission conducts business and adopts a General Assembly district plan.

i. Secretary LaRose has not engaged in contemptuous conduct and Petitioners' Motion is moot.

Secretary LaRose has not engaged in any contemptuous conduct and no finding of contempt is appropriate simply because the Commission did not convene at a time preferred by Petitioners. Nowhere in this Court's April 14 orders is there a directive for the Commission to meet at or by a certain date or time. Moreover, the Commission complied with this Court's orders when it convened on May 4, 2022. *See League of Women Voters*, Slip Opinion No. 2022-Ohio-1235 at ¶ 78. Because the Commission met and has not violated any deadline or directive of this Court, there is no actual and justiciable controversy. Petitioners' Motion is moot and it should be summarily denied. *Williamson v. Cooke*, 10th Dist. Franklin No. 05AP-936, 2007-Ohio-493, ¶ 12 (holding that once a party complies with the underlying court order, civil contempt proceedings become moot); *see Grundey v. Grundey*, 10th Dist. Franklin No. 13AP-224, 2014-Ohio-91, ¶ 20

(because a court must decide only actual controversies, it may not decide contempt once the contemnor has purged the contempt).

ii. Petitioners' Motion is based upon speculation and not ripe for adjudication.

Petitioners advance a purely speculative argument that members of the Commission should be held in contempt because not meeting by the time the Motion was filed or soon thereafter *may* lead to a failure to adopt a fourth revised plan and the federal court adopting the second revised plan in the Gonidakis Case. *Motion*, pp. 5-6. However, the law does not provide for anticipatory contempt based upon things that have not and may not occur. *Kirk v. Kirk*, 172 Ohio App.3d 404, 2007-Ohio-3140, 875 N.E.2d 125, ¶ 5 (3d Dist.). "An adjudication of contempt relates to past conduct, not prospective conduct…. Prior to the end of the time for performance, any alleged failure to perform is speculation and cannot be the basis for a contempt finding." *Id.* In *Kirk*, the court aptly observed "[t]o hold otherwise would result in the dockets of the courts being filled with antagonistic parties filing motions to show cause merely because they believe the other party is going to violate the court's orders." *Id.*

In *Bd. of Edn. of Brunswick City School Dist. v. Brunswick Edn. Assn.*, 61 Ohio St.2d 290, 401 N.E.2d 440 (1980), this Court was faced with the question of whether a finding of prior disobedience is a necessary antecedent to a court's imposition of coercive sanctions against future non-compliance with its order. Specifically, in *Brunswick*, a trial court sought to have teachers sign an affidavit stating that they would obey the terms of a temporary restraining order against a strike at all times, present and future. *Id.* at 295. Although the terms of the order did not require affirmative action on the part of the teachers until two days after the contempt hearing, the trial court found those teachers who refused to sign the affidavit to be in contempt. This Court reversed the trial court's decision, finding that prior disobedience of a trial court's order is a necessary

antecedent to a court's imposition of coercive sanctions in the exercise of its civil contempt powers against future non-compliance with such order. *Id.* This Court explained that "[a] finding of contempt is as reasonably a condition precedent to the imposition of coercive sanctions aimed at effectuating performance of an act as is a finding of contempt a condition precedent to imposing coercive sanctions seeking non-performance of an act." *Id.*

Here, Petitioners seek a finding of contempt for events that have not occurred and may not occur, which is untenable. The May 6 deadline to file a fourth revised plan has not passed and the federal court has not implemented a different plan.[1] This Court's April 14 orders even allow for the Commission to move for an extension of time to file a new district plan for good cause shown. *League of Women Voters*, Slip Opinion No. 2022-Ohio-1235 at ¶ 81. Accordingly, Petitioners' premature Motion based upon speculation fails and should be denied.

iii. The Separation of Powers Doctrine prohibits this Court from controlling the manner in which the Commission adopts a General Assembly district plan, including the time, place, or manner in which the Commission convenes.

Petitioners are incorrect and overreach with their assertion that Article XI of the Constitution provides this Court with "robust oversight" authority over the Commission. *Motion*, p. 7; *see, e.g., League of Women Voters*, Slip Opinion No. 2022-Ohio-1235 at ¶ 64, citing Article XI, § 9(D)(2) ("No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district"). Rather, this Court's function is to review a district plan adopted by the Commission for constitutionality. Constitution, Art. XI § 9(A-B). In fact, the Constitution only permits this Court to provide two remedies if it determines that a plan does not comply with Article XI. This Court can either order the Commission to (1) "amend the plan to

[1] As set forth above, this Court made clear that it would not act in violation of the Ohio Constitution simply because the federal court in the Gonidakis Case may act under federal law. *Supra*.

correct the violation," or (2) "adopt a new general assembly district plan." *Id.* at § 9(D)(3) ("If the supreme court of Ohio determines that [a plan is unconstitutional], the available remedies shall be as follows…"). This Court recognized such limitations in its most recent opinion, for instance:

> Senator Sykes and House Minority Leader Russo ask us to declare that the independent map drawers' plan is presumptively constitutional. There is also no constitutional basis for this court to grant that remedy. Article XI, Section 9(A) grants this court jurisdiction in cases arising under Article XI, and Section 9(B) contemplates that we may determine the constitutional validity of a "general assembly district plan *made by the Ohio redistricting commission*." (Emphasis added.) While the independent map drawers' plan may be the closest yet to meeting the Ohio Constitution's requirements, Article XI does not authorize this court to address the validity of a district plan in the absence of it being lawfully presented to this court for such a determination.
> …
>
> [W]e recommended that the commission take certain steps to ensure a constitutional process, we now likewise express the view that the commission should use the independent map drawers' work thus far as a starting point for the next plan.

League of Women Voters, Slip Opinion No. 2022-Ohio-1235 at ¶¶ 72, 77 (emphasis added).

Unfortunately, Petitioners have chosen to ignore the law and file a Motion improperly requesting that this Court exceed its authority to intervene in the map-making process. The foregoing and the Separation of Powers Doctrine prohibits that. *DeRolph v. State*, 78 Ohio St.3d 419, 420, 678 N.E.2d 886 (1997) ("Given the separate powers entrusted to the three coordinate branches of government, both this court and the trial court recognize that it is not the function of the judiciary to supervise or participate in the legislative and executive process."); *Kent v. Mahaffy*, 2 Ohio St. 498, 498-99 (1853) (explaining that "[w]e can exercise only such powers as the constitution itself confers, or authorizes the legislature to grant. We can derive no power elsewhere."); *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481, 17 S.Ct. 16141 L.Ed. 518 (1896) (finding that the court could not grant the request for a bill enjoining

legislative functions, as a court "ought not to attempt to do indirectly what it could not do directly"). As Justice Kennedy's recent dissenting opinion aptly stated:

> Adherence to the defined roles of each branch is essential to the functioning of our representative democracy. Therefore, maintaining respect for the enumerated powers granted expressly to the commission precludes this court from interfering with the exercise of those powers or attempting to supervise the commission's work through the threat of contempt…

League of Women Voters, Slip Opinion No. 2022-Ohio-1235 at ¶ 97.

Furthermore, the authority cited by Petitioners does not support their position. In *Hicksville v. Blakeslee*, 103 Ohio St. 508, 517, 518-20, 134 N.E. 445 (1921), this Court held that members of a municipal council are provided with qualified immunity when exercising their legislative discretion in voting. Here, Secretary LaRose has not even had the opportunity to vote on a fourth revised plan yet. And the other cases Petitioners cite are inapposite because, in each, the council members actually violated a court order and impeded the court's judicial function. *State ex rel. Turner v. Village of Bremen*, 118 Ohio St. 639, 163 N.E. 302 (1928) (finding village councilmembers in contempt for ignoring the writ of mandamus issued by the court); *State ex rel. Bd. of Cty. Comm'rs of Cuyahoga Co. v. Juv. Div. of Ct. of Common Pleas of Cuyahoga Cty.*, 54 Ohio St. 2d 113, 113-14, 374 N.E.2d 1369 (1978) (finding county commissioners in contempt for impeding the court's operation); *State ex rel. Edwards v. Murray*, 48 Ohio St.2d 303, 305, 358 N.E.2d 577 (1976) (finding contempt to be an appropriate remedy where the function of the court is impeded).

In this case, Secretary LaRose has not violated any court order or impeded this Court's judicial function (*i.e.*, to review the Commission's district plans for constitutional compliance). The May 6 deadline to file a new plan has not yet passed, and the Commission met on May 4 and

is scheduled to meet again on May 5. Accordingly, Petitioners' Motion fails in its entirety, and certainly as it pertains to Secretary LaRose, and should be denied.

IV. CONCLUSION

In accordance with the foregoing, Petitioners' Motion should be denied.

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